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JUN 29 1992

June 26, 1992 FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

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RE: COMMENTS TO PR DOCKET #92-80

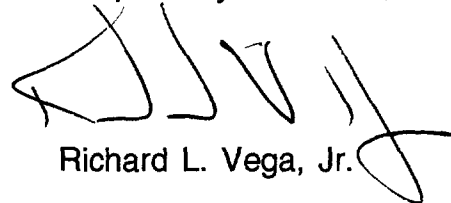
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FILE

Dear Ms. Searcy:

Enclosed herewith in original and nine (9) copies, are Comments filed to the Notice of Proposed Rulemaking in PR Docket #92-80 released on May 8, 1992.

Should the Commission have any questions concerning these matters Please contact the undersigned.

Respectfully submitted,



Richard L. Vega, Jr.

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enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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JUN 29 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Amendment of Part 1, 2, and 21
of the Commission's Rules Governing
Use of the Frequencies in the 2.1
and 2.5 GHz Bands

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PR Docket No. 92-80
RM7909

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To: The Commission:

COMMENTS

Phase One Communications, Inc.

Richard L. Vega, Jr., President
Communications Consulting Engineer
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June 26, 1992

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SUMMARY

Phase One Communications, Inc. ("Phase One"), has served the "wireless cable" industry for the past several years, and fully supports the Federal Communication Commission ("Commission") efforts to bring forth the benefits of MDS service to the public faster and to further increase administrative efficiency in the processing of applications.

Phase One believes that the MDS Processing and Regulation should remain under the province of the Common Carrier Bureau. The Common Carrier Bureau has developed a expert knowledge of MDS service and the complexities involved with MDS processing including the necessity to evaluate interference analysis between MDS operators and ITFS operators. Relocation of application processing at this point would only stymie the efforts of the Commission to accelerate the processing procedure speed.

Additionally, Phase One opposes any adoption of a distance separation standard, a derating distance separation table and/or a combination of distance separation requirements and desired-to-undesired signal strength ratios.

Phase One supports new restrictions as identified in the notice concerning settlement agreements and opposes the adoption of interim measures to deal with current pending applications.

A consolidated, up to date, database and utilization of lotteries is essential to the efforts to increase the time in which current MDS applications are processed. Phase One opposes any adoption of an MSA and RSA market definition since, as evidenced by the applications submitted in 1983 subject to market boundary restrictions, certain flaws exist in this proposal that would not result in more efficient and expedited processing.

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OFFICE OF THE SECRETARY

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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|-------------------------------------|---|---------------------|
| In the matter of |) | PR Docket No. 92-80 |
| |) | RM7909 |
| Amendment of Part 1, 2, and 21 |) | |
| of the Commission's Rules Governing |) | |
| Use of the Frequencies in the 2.1 |) | |
| and 2.5 GHz Bands |) | |

To: The Commission:

COMMENTS

Phase One Communications, Inc., ("Phase One"), an engineering consulting company located in Orlando, Florida, in response to the NOTICE OF PROPOSED RULE MAKING ("Notice") in PR Docket No. 92-80, released on May 8, 1992, hereby submits its COMMENTS ("Comments") to the Notice. Phase One, having served the wireless cable industry for the past several years, fully supports the Federal Communications Commission's ("Commission") efforts to bring forth the benefits of MDS service to the public faster and to further increase administrative efficiency in the processing of MDS applications. In support whereof, the following Comments are submitted.

I. BACKGROUND

1. On October 26, 1990, the Commission released its Report and Order ("Order") in General Docket No. 90-54, General Docket 80-113, (terminated), and on October 25, 1991, released the Second Report and Order ("Second Order"), collectively

referred to as "Orders". Together the Orders adopt specific rule changes in an effort to promote the wireless cable industry by specifically modifying its application processing rules directed towards MDS, MMDS, and OFS services.¹ Adoption of the Orders moved the wireless cable industry closer to providing a truly competitive alternative to traditional cable operations. In the Orders, the Commission addressed the issues dealing with mass application filings by incorporating a "one-day cut-off" filing period. The Commission now seeks comments to address the issue of application processing in an effort to expedite the number of new stations licensed thereby providing a new and improved competition medium in the video marketplace; Phase One will comment on the most relevant issues contained in the Notice as follows:

II. ISSUE 1 - RELOCATION OF MDS PROCESSING

2. In the Notice, the Commission proposes to relocate some or all aspects of MDS processing to the Private Radio Bureau located in Gettysburg, Pennsylvania. The Commission contemplates relocating MDS Processing or both MDS Processing and Regulation, to the Private Radio Bureau. Further, the Commission is considering relocating MDS Processing and Regulation entirely to the Mass Media Bureau and finally, the Commission considers leaving MDS Processing and Regulation in the current location; the Common Carrier Bureau located in Washington, D.C. :

3. The decision to relocate the MDS Processing and/or both MDS Processing

¹Reference to MDS Channel 1, MDS Channel 2, MDS Channel 2A, MMDS E-Group, MMDS F-Group, and MDS H1, H2, and H3 Channels will be referred to collectively as "MDS Channels" throughout this document.

and Regulation to the Private Radio Bureau hinge on three separate issues:

- a) Is MDS classified as a Private Radio Bureau service provider;
- b) Will the Commission adopt a fixed distance separation criteria which, based on other services licensed by the Private Radio Bureau, will meet the basic technical requirements of Private Radio Bureau application processing² and,
- c) Will the introduction of other new services and modified rules in the Private Radio Bureau place a strain on the staff? The Private Radio Bureau has received several thousand applications for 220-222 MHz service, 900 MHz Multiple Address Service and has received a major volume increase in applications proposing 18GHz Video Service. Further, the Private Radio Bureau has a track record of "freezing" application filings as evidenced in the 220-222 MHz service and earlier when they processed OFS H-Group applications.

4. Phase One does not support a reallocation to the Private Radio Bureau for MDS Processing and/or both MDS Processing and Regulation for the following reasons:

- a) The Private Radio Bureau primarily licenses those services utilized solely for the applicant's own use (i.e. taxi cabs, fire departments, security for business). MDS service differs in the fact that service is provided mainly to subscribers, unrelated to the licensee, located within a designated service area. Also the growing relationship between MDS

²Currently, most services licensed under the Private Radio Bureau are subject to distance separation requirements.

operators and ITFS operators, a service licensed under the Mass Media Bureau, further separates itself from Private Radio Bureau classification.

b) There should not be a fixed distance separation criteria applied to MDS applications as addressed further in this document, see page 5, paragraph 6. Fixed distance separation application requirements are almost mandatory under the Private Radio Bureau.

c) Finally, Phase One believes that relocating MDS Processing and Regulation would create a monumental burden to the Private Radio Bureau staff based on the current backlog of applications on file for other services.

5. Consolidation of MDS and ITFS application processing under the Mass Media Bureau seems practical and may be warranted. However, the fact that an MDS operator may still elect to provide service as a traditional common carrier, one that chooses to operate its facility under a tariff as filed with the Commission, licensing under the Mass Media Bureau does not exactly fit the category. Additionally, while the current trend of operation under an MDS authorization is to provide video entertainment to a community as an alternative to traditional cable service future operation schemes may change. In fact, the Commission is cautioned that tightening control over the current variations of MDS service offerings may not allow an operator to make appropriate adjustments to its service as its future dictates. For example, the ever-looming possibility of telephone company entry into cable television service as well as the growing availability of direct broadcast satellite service, requires the MDS operator to be capable of modifying its service offerings without regulatory restrictions imposed on a Private Radio operator or a Mass Media operator. Hence, it is the belief

of this author that other changes, discussed herein, would prove sufficient to expedite MDS processing and therefore, believe that the processing of MDS applications should remain in the province of the Common Carrier Bureau.

III. ISSUE 2 - PROPOSED RULE CHANGES

6. **Distance Separation Tables** - The Commission's consideration of incorporating a distance separation standard rather than maintaining the current "desired-to-undesired" interference protection standard simply as the ultimate modification to speed applicant processing is unfounded, unworkable, and detrimental to the overall scope of the Commission's intentions to foster the growth of the MDS service. First, the Commission has not indicated what percent of the processing time is dedicated to interference study verification. The Commission offers no support in which a radically modified interference standard should be established to overcome the current burdens occurring in completing interference study verifications. Phase One believes that all processing delays associated with Item 17(a) of the FCC Form 494 application are directly attributed to the necessity for the Commission staff to verify that all stations located within 50 miles of the new transmitter site were included in the interference study, and confirmation that there are no applications already on file proposing the same or nearby market. These same delays would remain if the Commission incorporates a fixed distance separation standard as the same verification process would remain intact.³

³In this instance, conceivably, an application, once submitted, could be immediately logged into a central computer which the Commission could then include in evaluating those applications currently in process. Although, at no fault of the Commission or Commission's staff, based on the incredibly large volume of applications being

7. The Commission has its own "in-house" computerized interference program, has access to all MDS transmission configurations (i.e. power, heights) and further, has the capability of dismissing an application based on a violation of the interference potential. However, to date, Phase One is aware of absolutely no instance of which an application was dismissed due to its inability to protect an existing station's FCC authorized protected service area or ITFS receive site. Part of the Commission's problem in processing applications appears to be directly related to its inability to determine what stations are within 50 miles of a new application to which the new applicant was required to complete an interference analysis.⁴ Therefore, it has not been established that the abolishment of current interference protection requirements would necessarily speed the processing of an application.

8. Section 21.902(g) of the Commission's Rules, requires that "All interference studies submitted pursuant to paragraph (c) of this section shall be served on all licensees and permittees of, and applicants for the stations considered in such studies. This service shall occur on or before the date of submission and a list of all parties so served shall be submitted with the study." Recent modifications to the Commission's notification requirements to all ITFS applicants, permittees, and licensees, stipulate that no MDS application will be granted until certification of service is completed and evidence thereof is provided to the Commission indicating that a copy

³continued submitted, it is certain that applications being entered into a computer database would be delayed, applications would be lost, and data would be inadvertently entered in error thereby affecting any Commission evaluation.

⁴The Commission's staff has indicated that once an application is ready for processing, determination of the location of all other previously proposed and existing licenses becomes a great challenge. The remedy in documenting application submittal and station location will occur once the comprehensive database has been established.

of the interference study had been sent to and received by all ITFS effected parties. It has been the experience of Phase One that any opposition to a application and its potential for harmful interference will typically surface at this stage, not from the Commission but from the party affected by the proposal. Phase One believes that more burden should be placed on the station(s) affected by the new or modified proposal in notifying the Commission of its objection(s) thereby alerting the Commission to possible interference violations. Phase One proposes that new or modified applications should be required to forward copies of the interference analysis via Certified Mail, Return Receipt Requested to all affected parties (MDS and ITFS) with follow-up verification to the Commission within 20 days following the initial notification⁵. The Commission's authorization of the new or modified MDS application would not occur until the 90th day from the initial notification date. These rules would effectively duplicate those rules adopted under the Orders for MDS applications notifying affected ITFS stations, see Section 21.901(d) of the Commission's Rules (amended). This process will allow those applicants an extended time in which to monitor Commission records to ensure that all stations were included in the interference study originally submitted in the application.⁶ The Commission must allow for a grace period in which a truly deserving and qualified applicant has an opportunity to "self" protect its own

⁵Notification should be deemed sufficient for multiple filed applicants for the same market that are represented by the same entity.

⁶The Commission is reminded that no perfect database tracking system exists such that the Commission's staff, application preparers, and other interested parties have the ability to document newly filed applications the instant they reach the Commission's Pittsburgh filing location. Additionally, there is no perfect method in which an application can be effectively processed when the Commission is in receipt of an extraordinary number of applications affecting those applications already on file.

newly filed application from certain dismissal by monitoring application activity. The adoption of the one-day cut-off filing period has created a situation in which market availability cannot be confirmed. Creation of a fixed distance separation requirement would further complicate the uncertainty of market availability and, most definitely, result in further application processing chaos. This determination is based on the current situation where the Commission indicates that over 1000 applications are being submitted each month. Absolutely no reprehensible harm should come of an applicant such as denial with prejudice of all applications filed or, further, referral to the Department of Justice for possible criminal prosecution pursuant to 18 USC Section 1001, in response to submission of false certification since identification of all existing stations within any given distance is now, and will be, impossible to determine.

9. The Commission must not ignore the fact that current desired-to-undesired signal ratio protection standards have proven effective and have undergone intense scrutiny by Commission staff, existing licensees, and other parties with respect to its validity. As the Commission has on several occasions revisited the subject of interference study requirements, in each instance, the Commission has discounted all proposed alternatives in favor of the current interference study standard. This is a standard that has proven effective in both the MDS and ITFS industry. The current interference study procedures have been perfected by those involved in interference study evaluation and are subject to additional advancements in technology which provide for greater MDS and ITFS service offerings where, in the past, none existed.⁷

⁷The obvious utilization of opposite polarization, directional antennas, and other techniques in addition to Commission recognition of frequency offset operation, have allowed for greater flexibility in the placement of MDS and ITFS operations. This benefit to the community will most certainly disappear with the adoption of a fixed

10. Finally, the adoption of distance separation requirements cannot possibly work since there remains a potential of interference to stations that incorporate unique operation parameters such as point-to-point, inherent in the ITFS industry. Thus, incorporation of distance separation standards between ITFS and MDS application processing would be detrimental to the Commission's intent. The adoption of distance separation requirements on MDS applicants and then the utilization of desired-to-undesired signal ratios to ITFS stations would create a monumental burden to the Commission's processing staff. The Commission is still required to evaluate the interference potential, perhaps on an abbreviated basis, but nonetheless, a basis that does not provide for expedited application processing. Any hint of distance separation success would only be realized by the across-the-board adoption of distance requirements for both ITFS and MDS.

11. The Commission is advised of pitfalls inherent in a distance separation scheme that was increasingly visible to the H-Group applications when they were processed by the Private Radio Bureau. Specifically, if the Commission were to adopt the short-spacing standard, an applicant could effectively short-space itself and create a "daisy-chain" scenario thereby eliminating competition within any given wide area.⁸

⁷continued mileage distance separation requirement. Essential harmony has been created in utilization of the current interference protection standards, at least experienced by Phase One, in the cooperation amongst most new and existing operators in resolving interference conflicts. Open negotiations with both MDS and ITFS operators has increased substantially over the past several years with respect to resolving interference problems. Existing licensees, permittees, and applicants recognize that costs associated with litigation and delays caused by Commission intervention are not proven effective towards MDS and ITFS advancement. To adopt a straight distance separation standard for the sole purpose of expediting application processing is unnecessary.

⁸Current MDS Rules allow one entity to own other MDS stations within 50 miles.

Certainly the Commission could adopt strict short-space criteria although any type of Commission ruling that effectively restricts service to any given area is not in the public interest. The Commission could impose ownership restrictions prohibiting one entity from owning a station within 50 miles but that rule alone would not necessarily curb any abuse of Commission policy.⁹

12. The fact that the majority of applications currently specify transmit sites within 50 miles is another indication that distance separation requirements are not in the public interest. The traits of U.S. population densities suggest that the Commission could potentially deprive a great majority of people from enjoying the benefits of MDS service with the adoption of a distance separation standard. Additionally, any adoption of a short-space derating table creates unrealistic burdens on the applicant proposing a site within 50 miles subject to a compromised MDS operation parameter in order to meet the HAAT-distance requirements established in such a table. Upon evaluation of the Commission's latest inventory, the majority of populated areas have been applied for either by MDS or ITFS applicants. It is presumed that the Commission will subject all major modification applications to the distance separation requirements which will undoubtedly result in further processing delays. In fact, to further harbor processing delays, the Commission's proposal to include new stations using the distance separation standard will be unmanageable if the Commission continues to receive 1000 applications per month.

13. **Settlement Agreements** - Phase One fully supports the Commission's

⁹Phase One believes that short-spacing of stations might be limited to only "friends of" the existing station. Further, conceivably any new applicant seeking a short-spacing agreement may be forced into a payoff to the previously authorized licensee.

proposal to disallow settlement agreements among MDS applicants and prohibiting applicants from holding any type of interest, including serving as a officer, director, shareholder, trustee, beneficiary, owner, general or limited partner, or similar position, in more than one application for the same channel or channels at sites within the same service area. It would appear that if the Commission recognizes and were to adopt settlement agreement restrictions, it would alone be sufficient to achieve the objectives of the Commission and that all other issues would be deemed moot since the Commission's own comments contained in the Notice, see Paragraph 17, states that, "...we [the Commission] anticipate the rate of incoming MDS applications to subside to an extent that will not overstrain our resources."

14. By the Commission's own statements that "the majority" of MDS applications "are believed to be speculative" the Commission should also modify the FCC Form 494 application, Item #31, Certification of Applicant, to include a statement that the "applicant understands that processing of MDS applications could take six to 12 months". The typical characteristic of a speculator is one whom engages in risky business transactions on the chance of a quick profit. New applications filed with the Commission should diminish substantially due to Commission disclosure of processing time expectations thereby closing the door to a quick fix.

15. **Interim Measures** - Adoption of any interim measure to reduce the current backlog of MDS applications would prove unfair to those applicants filed prior to the deluge of "speculative" applications. The burden of locating a transmit site to meet distance separation requirements is unnecessarily burdensome to those applicants who are not part of any mass application grouping. The Commission's adoption of settlement agreement restrictions combined with the one-day cut-off procedure and

strict enforcement of the April 19, 1988 filing guidelines will, by the Commission's own account, reduce the number of applications submitted substantially. Therefore, Phase One believes that no interim measures are required.

IV. ISSUE 3 - PROCESSING OF APPLICATIONS

16. **Consolidated Database** - Phase One believes that the Commission should consolidate the database to include all pending and existing MDS and ITFS channels so that the database includes at least, the file number, applicant name, city, state, channel, latitude, longitude, application status, service type, ERP, and antenna height. The Commission would be able to effectively monitor, process, and analyze applications directly incorporating the consolidated database in its MDS and ITFS processing procedure. Additional information pertaining to specific ITFS receive site configuration as submitted to the Mass Media Bureau¹⁰ and transmitting antenna patterns could be incorporated into the consolidated database. Thus, interference study verification could be accomplished with basically one "keystroke". The Commission would most certainly realize an expedited process by adopting a consolidated, more detailed, and advanced database than currently utilized by both the Mass Media Bureau and Common Carrier Bureau.

17. **Lotteries** - Phase One supports the Commission's proposal to use the random selection procedure for all single Channel 1, Channel 2, and Channel 2A applications which are currently subject to comparative hearing criteria. The Commission adoption of a random selection process for these single channel

¹⁰The Mass Media Bureau's Distribution Services Branch has requested detailed receiver site data from ITFS applicants, permittees and licensees.

applications moves in the direction of establishing a "one-stop shopping" mechanism as desired by the Commission.

18. Furthermore, Phase One supports the Commission's reference to incorporating a computer based random number generator to conduct the lotteries for other services in place of the traditional plexiglass raffle drum or ping-pong ball air blown machine. Phase One believes that the Commission should extend the use of a computerized lottery to all MDS channels. Phase One believes that the data encryption standard of the National Institute of Standards and Technology would perform the function of lottery processing in a sufficient and expedited manner. Phase One concurs with the Commission Private Radio Bureau statement that the cryptologic complexity of the data encryption standard assures that the sequencing of applicants would indeed be unbiased. Again, utilization of this technology will allow the Commission to process MDS applications much quicker without compromising the quality and standard of each individual application.

19. **Market Definition** - Phase One opposes the Commission's proposal to incorporate market boundary definition similar to cellular telephone which currently recognizes the census bureau Metropolitan Statistical Areas ("MSA") and the Mobile Services Division Rural Service Areas ("RSA") boundaries as the official cellular market. Similar to a situation involving daisy-chaining as described earlier, single applicant monopoly of a particular area could occur in adoption of market definition utilizing MSA and RSA boundaries. In this instance, due to the typically large area of a particular MSA or RSA boundary, an MDS licensee could effectively control the area for an unspecified period of time thereby prohibiting service to communities desirous of an alternative video delivery source. The Commission's suggestion that possible

"engineering-in" of RSA's and MSA's with sufficient size and unserved areas is unrealistic and most definitely moves away from of the Commission's intention to speed the processing of MDS and foster the growth and competition of a new video service. Specifically, the Commission is suggesting that a particular community be subject to future engineering-in application acceptance before it is offered a video alternative. Unfortunately, there is no guarantee as to the time and duration that service would be provided in these areas.

20. The Commission is reminded that it adopted the MSA market boundary for the acceptance of MDS applications filed in 1983 under the one-day cut-off. Since, by the Commission's own account, many of these applications remain pending and unprocessed, incorporation of a specific market boundary has proven ineffective. Additionally, the faults of a specific market boundary rule is evident in the one-day applications filed in 1983. For example, the distance separation between certain MSA's such as Portland, Maine, and Lewiston, Maine, have created a situation in which the applications selected in the lottery are separated by a mere 21 miles. It is believed that there are several additional MSA and RSA locations that would have similar spacing problems whether or not the Commission incorporated the distance separation standards or maintained the current desired-to-undesired standards. Also, the Commission would be subject to arbitrary transmitter site locations that would create certain confusion to the Commission's staff and those desirous of serving a particular MSA or RSA as is the case of Post-Newsweek Cable which has submitted an application in the Tulsa, Oklahoma MSA but is utilizing a transmitter site located near Ponca City, Oklahoma, which is more than 75 miles from the major population area (Tulsa) for which the MSA was named.

21. **Processing of Pending and Future Applications** - Phase One believes that the Commission should not simply return all pending applications in favor of adopting any proposal not favored herein. Phase One believes that the Commission's ability to resolve the processing delays to a reasonable extent will be more than satisfactory to the public interest without having to "clear the plate and start over". Specifically, the Notice makes no mention of what the Commission deems an acceptable time frame for an application to be processed. While some services are capable of authorization within a few days or weeks, other services such as FM radio, could take several years. The scope of MDS service does not deserve a "rubber stamp" processing standard to be adopted by the Commission. Each and every application received by the Commission is essentially different.¹¹ Phase One applauds the MDS staff in its efforts to handle the deluge of applications and conforming to Commission regulation changes¹², and dealing with applicant inquiries regarding application status. The Domestic Radio Branch which processes MDS applications has not been provided with a consumer assistance division similar to the Private Radio Bureau nor has this Branch been provided with the number of staff members that other branches of the FCC are privy. The Commission cannot be faulted for their past MDS processing problems since no one could have predicted the number of applications being submitted would increase ten fold. As the Commission is now soliciting

¹¹Phase One recognizes that those speculative applications orchestrated by various application mills are extremely similar and rarely reflect a system design or a applicant that is knowledgeable to the community proposed, although not every application shares this trait.

¹²In the past two years the MDS Processing Division has undergone radical changes and encounter further delays solely by the issuance of two separate Report and Orders and an Order on Reconsideration.

comments to address issues involving processing delays, Phase One believes that the following will most certainly provide an increase in MDS application processing and additionally, looks towards mass education of MDS opportunities to help curb the number of speculative applications from being submitted.¹³

- a) Eliminate all applications submitted under the one-day filing period on September 1983. Those applications not selected in lottery should be dismissed and purged from the files.
- b) Strict adherence to the April 19, 1988 limited filing acceptance policy should be incorporated.
- c) Adoption of one-day cut-off with 90 day processing standard and Certified Mail notification requirement for all new applications.
- d) Adoption of strict settlement agreement rules.
- e) Incorporation of computer-based random number generator for the lottery process.
- f) Allow for the use of one FCC Form 494 regardless of the number of channels submitted.
- g) Utilization of a sophisticated MDS/ITFS computer database to allow for a "one-keystroke" application evaluation.

22. These policy, rule changes, and procedures, some already incorporated, together will most certainly increase the processing speed for MDS applications.

¹³Phase One has been made aware of several national media stories relative to application mills, filing scams, misleading statements involving the wireless cable industry. Such shows as the Baltimore Evening News on WBAL-TV and ABC's "Good Morning America" program are a few of the notable media shows recently carrying information on "the risks" of wireless cable.

Finally, it is not believed by this author that the abandonment of this service from its current location is the answer to the Commission's processing problems as the other Bureaus would most definitely need to acclimate themselves to the service, the channels, the filing tendencies of certain organizations, etc. This process will most certainly incur additional delays and takes a service away from a staff that has done an outstanding job in processing the applications received to the best of its ability based on the truly unique MDS service.

V. CONCLUSION

23. Wherefor, the foregoing information considered, Phase One Communications, Inc., requests the Commission adopt those changes as proposed herein and maintain those that have been determined to be effective and/or in the public's interest.

Respectfully submitted,
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Dated: 6/26/92